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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 594

RIORDAN J. A. ROETT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 139–143) is reported at 172 F. 2d 379.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1949 (R. 143). The petition for a writ of certiorari was filed on February 24, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the trial court erred in denying petitioner's motion for a judgment of acquittal on

the ground that he was entrapped into committing the offenses charged against him.

STATEMENT

Petitioner and others were indicted in the District Court for the District of New Jersey for violating and conspiring to violate certain provisions of the Internal Revenue Code [1] by operating an unregistered still, engaging in the business of distilling with intent to defraud the United States of taxes, and removing distilled spirits on which taxes had not been paid (R. 13–22). So far as material to the defense of entrapment, which is the sole issue presented in the petition for a writ of certiorari, the material facts may be summarized as follows: [2]

In January 1946, petitioner, a lawyer who used the alias "Johnson", accompanied by others, approached Kell, the owner of a farm, and requested him to lease part of it to petitioner and his associates (R. 24–26).[3] Kell was undecided at first and petitioner asked his help in finding a place (R. 26). Shortly thereafter, petitioner again requested Kell to rent part of the farm but

[1] 26 U. S. C. 2810, 2833, 3321.

[2] These facts are substantially identical with those recited in *Trupiano* v. *United States*, 334 U. S. 699, 701, 711, which involved a motion by petitioner and his confederates before the indictments were returned to suppress certain evidence alleged to have been obtained by an illegal seizure.

[3] Petitioner had made a similar proposition to Kell about 18 months or two years previously but nothing came of it at that time (R. 26).

Kell declined (R. 27). Petitioner persisted, however, and went to Kell on at least two subsequent occasions with the same proposition (R. 27, 56).

Kell suspected that petitioner wanted to construct a still on the land and reported the matter to agents of the Alcohol Tax Unit of the Bureau of Internal Revenue (R. 26, 27). He was advised that he could rent the farm to petitioner and his associates but was admonished to do nothing to entice or encourage them to proceed with their plans (R. 27, 57, 87–88). Accordingly, Kell notified petitioner by letter that, in response to the latter's request, he had found a place for him (R. 48–49, 56). Petitioner wrote Kell that "Weather conditions have retarded plans for a week or two and the proper people for technical purposes will not be available for at least that period. Will contact you further within a week or so" (R. 30). Finally, in March 1946, petitioner and Kell agreed on the rental of part of the farm for $300 a month (R. 28). Petitioner told Kell that continuance of the project was contingent upon the availability of an adequate supply of water and asked Kell to engage a well-digger (R. 34–35). Kell attempted to do so but was unable to complete the necessary arrangements and the well-digger was finally hired by petitioner and his associates, who paid for his services (R. 35, 71–75).

When Kell reported his suspicions to the Alcohol Tax Unit, Nilsen, a federal agent, was assigned, with Kell's knowledge, to work on the farm in the disguise of a farmhand (R. 31, 91). He was instructed, as was Kell, in respect of any contacts with petitioner and his associates, "not to entice or help them in any way other than if they asked for help, to be there on the premises, to keep silent, to keep in the background with the idea that they would hire him to work for them" (R. 89). Nilsen was present but took no part in the meeting at which the negotiations for the rental of the premises were concluded (R. 34).

Petitioner gave Kell $150 to buy a scoop to excavate for a building on the farm (R. 35). Nilsen and Kell assisted petitioner and his associates in the erection of a building at a place designated by petitioner and in the installation of distilling equipment (R. 98–107). Petitioner himself drove a truck on which building materials were hauled to the farm and helped with the construction work (R. 36–37, 99).

Operation of the still began in May 1946 (R. 108). At petitioner's request, Nilsen worked as a "mash man" at a salary of $100 a week (R. 41, 101). Nilsen communicated frequently with his fellow agents and informed them of the operations which were taking place (R. 125).

Petitioner had been acquainted for several years with Legg, the Chief of Police of a nearby

borough, and on occasion had solicited "protection" from Legg for illicit operations which were planned by individuals whom petitioner introduced to Legg (R. 62–63). On January 28, 1946, while Legg was in Washington, D. C., petitioner told him by telephone of his plan to construct and operate a still on the Kell farm. Legg advised petitioner not to start operating the still before he returned home at the end of March, and he immediately informed the Alcohol Tax Unit of this conversation. (R. 58–60.) Petitioner subsequently reported to Legg many times about the progress of operations at the farm (R. 60) and he paid Legg a weekly "fee" of $50 to assure "protection" for the transportation of materials to and from the still (R. 60–69).

At the close of the evidence, petitioner moved for a judgment of acquittal on the ground that the evidence established entrapment as a matter of law (R. 127). This motion was overruled (R. 128) and the issue of entrapment was submitted to the jury under appropriate instructions to which no objection is made (R. 131–133).

Petitioner was convicted as charged (R. 4, 10) and he was sentenced to imprisonment for an aggregate period of three years and a day (R. 5, 12). His conviction was affirmed by the Court of Appeals for the Third Circuit (R. 143).

ARGUMENT

Petitioner's sole contention is that the evidence conclusively established entrapment and that the trial court therefore erred in denying his motion for a judgment of acquittal (Pet. 12–16). He argues that no crime had been committed prior to the time Kell reported his suspicions to the Alcohol Tax Unit and, consequently, the agents were not justified "in inducing him to violate the statute" (Pet. 14).

The premise that no crime had been committed before Kell assented to the rental of part of his farm is of extremely doubtful soundness. The negotiations which preceded Kell's action indicate that a conspiracy to violate the revenue laws was complete before the federal agents were apprised of the scheme. The gist of the crime of conspiracy is an agreement or confederation to commit an illegal act (*Braverman* v. *United States,* 317 U. S. 49, 53), and petitioner's approaching Kell was certainly an overt act. But it is immaterial to the issue of entrapment whether a crime had or had not been committed prior to the intercession of the federal agents, for it is clear in any event that the crimes of which petitioner stands convicted were not instigated or induced by the federal agents, and, therefore, petitioner was not entrapped.

The evidence plainly shows that the criminal design to violate the revenue laws by operating an

illicit still originated, not with the agents, but with petitioner and his confederates. Petitioner persistently sought to induce Kell to rent part of his farm or find some other place where the conspirators could pursue their criminal program. True, the agents told Kell to go ahead and rent to petitioner and report to them, at the same time admonishing him not to entice or encourage the setting up of a still (R. 27, 57, 87–88), and they also placed an undercover agent on the farm to secure evidence of violations. But it is well established that such methods of crime detection do not constitute entrapment. *Sorrells* v. *United States,* 287 U. S. 434, 441–442; *United States* v. *Lindenfeld,* 142 F. 2d 829 (C. A. 2), certiorari denied, 323 U. S. 761; *United States* v. *Brandenburg,* 162 F. 2d 980 (C. A. 3), certiorari denied, 332 U. S. 769; *Weathers* v. *United States,* 126 F. 2d 118 (C. A. 5), certiorari denied, 316 U. S. 681; *United States* v. *Cerone,* 150 F. 2d 382 (C. A. 7), certiorari denied *sub nom. Aloisio* v. *United States,* 326 U. S. 756; *Louie Hung* v. *United States,* 111 F. 2d 325 (C. A. 9). None of the cases relied upon by petitioner (Pet. 9) expresses any contrary principle.

None of the elements of entrapment were shown here; this is clearly not a case in which government officers implanted in petitioner's mind a disposition to commit the offense and then lured him on by inducements. To the contrary, it was

only after repeated requests by petitioner that Kell made his farm available. Moreover, he and Nilsen rendered only such services as petitioner expressly solicited. It is doubtful on this record whether petitioner was entitled to have the defense of entrapment submitted to the jury. Since, however, it was submitted with complete and accurate instructions (R. 131–133) and was resolved against petitioner, a sufficient answer to his contention is that the showing of entrapment was not so conclusive as to entitle him to an acquittal as a matter of law.

CONCLUSION

The decision below is correct and no conflict of decisions is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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